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No. 09-1027

In the Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,

Petitioner,

v.

NEW ALBANY DVD, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* INDIANA FAMILY INSTITUTE, INDIANA AMERICAN FAMILY ASSOCIATION, CITIZENS FOR COMMUNITY VALUES, CORNERSTONE POLICY RESEARCH, DELAWARE FAMILY POLICY COUNCIL, FAMILY FOUNDATION, FAMILY POLICY COUNCIL OF WEST VIRGINIA, FLORIDA FAMILY POLICY COUNCIL, GEORGIA FAMILY COUNCIL, LIBERTY INSTITUTE, LOUISIANA FAMILY FORUM, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN AND FAMILIES, NEW JERSEY FAMILY POLICY COUNCIL, NORTH CAROLINA FAMILY POLICY COUNCIL, OKLAHOMA FAMILY POLICY COUNCIL, PENNSYLVANIA FAMILY INSTITUTE, SOUTH DAKOTA FAMILY POLICY COUNCIL, WISCONSIN FAMILY COUNCIL IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

By March 18, 2010, *amici curiae* Indiana Family Institute, Indiana American Family Association, Citizens for Community Values, Cornerstone Policy Research, Delaware Family Policy Council, Family Foundation, Family Policy Council of West Virginia, Florida Family Policy Council, Georgia Family Council, Liberty Legal, Louisiana Family Forum, National Coalition for the Protection of Children and Families, New Jersey Family Policy Council, North Carolina Family Policy Council, Oklahoma Family Policy Council, Pennsylvania Family Institute, South Dakota Family Policy Council, and Wisconsin Family Council, as required by Sup. Ct. R. 37.2(a), notified both Petitioner's counsel and Respondent's counsel of its intent to file this brief *amici curiae*. Petitioner's counsel consented to this filing, but Respondent's counsel did not. Consequently, *amici* move this Court, pursuant to Sup. Ct. R. 37.2(b), for leave to file this brief of *amici curiae*.

Amici, as described below, are not for profit organizations that seek to benefit families, children, and their communities. They are concerned about the secondary harms associated with adult businesses including crimes that affect families and children, sexually explicit materials in the hands of children, and the effect of such businesses on communities (including property values). Numerous of the *amici* organizations produce reports and regularly advocate before state

and local governments for the need of adult business regulations or litigate to protect communities from the secondary harms of such businesses.

Amici request leave to file this brief to communicate their concern that the decision of the United States Court of Appeals for the Seventh Circuit strays from this Court's established caselaw and will undermine the ability of municipalities to effectively deal with negative secondary effects. Given the work of *amici* and their perspective from particularized experience advocating for families and children by seeking regulation of adult businesses this Court should grant leave to file this brief of *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI*[1]

Amici are numerous tax-exempt organizations with memberships in various states that share a common concern over the impact of public policies on families and family life. In particular, these organizations recognize that the negative secondary effects of adult businesses can have a serious impact on families. They wish local government to be able to appropriately regulate adult businesses to limit such negative effects as crime affecting families, the deterioration of neighborhoods (including decreased property values), and the exposure of sexually explicit materials to children. Many of the *amici* have for years regularly advocated before both state and local governments for policies, like these, that serve our families. Their collective work has included policy reports, education, testimony before governmental bodies, and even litigation. *Amici* submit this brief in support of Petitioner, City of New Albany.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. Petitioner's counsel consented to this filing, but Respondent's counsel did not. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or part, and that no person or entity, other than the Alliance Defense Fund or one of the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The United States Court of Appeal for the Seventh Circuit departed from established caselaw and instituted a rule that is unworkable for municipalities and that undermines the ability of municipalities to protect their communities from the negative secondary effects of adult businesses. *Amici* pro-family organizations urge this Court to grant New Albany's writ of certiorari so that municipalities can continue to enforce modest but necessary regulations aimed at the secondary effects of such businesses.

Despite the characterization of the court below, significant harm arises out of adult businesses, including retail-only adult bookstores. Numerous cases from various circuits have recognized the negative secondary effects of retail-only adult bookstores and upheld local ordinances. The Seventh Circuit, however, applied a heightened level of scrutiny to adult business regulations, despite caselaw from this Court that gives appropriate leeway to municipalities to craft solutions to significant problems. The new approach taken by the Seventh Circuit will make it extremely costly and difficult for municipalities to adopt appropriate regulations, even simple limitations on the location of adult businesses. Because of the significance of the negative secondary effects of sexually oriented businesses, this Court should grant New Albany's writ of certiorari so that municipalities can continue to rely on clear direction from this Court.

ARGUMENT

I. Municipalities serve their communities best when they are able to limit the negative secondary effects of adult businesses, including the effects of retail-only adult bookstores and video stores.

This Court has long observed the negative secondary effects associated with adult businesses. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (recognizing that adult businesses can "damage the value and the integrity of a neighborhood") (Kennedy, J. concurring); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Despite the general recognition of harm, the court below suggested that there is little evidence of harm from retail-only adult bookstores and video stores. On the contrary, evidence of harm abounds.

The Ninth Circuit Court of Appeals in *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004), was confronted with a case involving retail-only adult businesses and recognized the evidence of harm that comes from such businesses. While World Wide Video complained that none of the studies relied on by Spokane to justify their restrictions related to retail-only businesses, *see id.* at 1190, 1197, the court pointed to an abundance of evidence including "citizen testimony concerning pornographic litter and public lewdness," *id.* at 1195. The court recognized that this was sufficient

to justify the ordinance. *See id.* But the evidence was significantly more detailed. In fact, persons "witnessed various criminal acts in and around World Wide's stores, including prostitution, drug transactions, public lewdness, harassment of citizens by World Wide's clientele, and pervasive litter, including used condoms, empty liquor bottles, and video packaging featuring graphic depictions of sexual acts." *Id.* at 1190 n.6. For instance, "a pedodontist working in a building less than a block away from a retail-only store complained of pornographic litter, harassment of female employees, vandalism, and decreased business, all resulting from his proximity to the retail-only store." *Id.* at 1197. Finally, testimony that retail only stores have "economic and aesthetic impacts upon neighboring properties" was provided by Spokane. *Id.* at 1197-98.

This was not the only Circuit Court decision to recognize negative secondary effects to retail-only adult businesses. In *H & A Land Corp. v. City of Kennedale, Tex.*, 480 F.3d 336 (5th Cir. 2007), the Fifth Circuit examined evidence of such harm. One study, conducted by Indianapolis in 1984, polled members of the American Institute of Real Estate Appraisers. "Eighty percent of the respondents predicted that an adult bookstore would negatively impact residential property values, and seventy-two percent believed commercial property value would also be negatively [a]ffected." *Id.* at 340. "29% believed such an establishment would attract 'undesirables' to the neighborhood" and "14% felt it would create a bad image of the area" when asked

to explain the negative impact. *Id.* "*These reasons are equally applicable to an on-site or off-site establishment....*" *Id.* (emphasis added). Another study, by Oklahoma City, surveyed real estate appraisers in that city. "Seventy-four percent predicted a negative impact on real estate value in the surrounding area." *Id.* Based on this evidence, the court upheld an ordinance regulating the location of adult bookstores.

Likewise, the Eighth Circuit in *ILQ Invs., Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), recognized the harm "specifically attributable to adult bookstores...." *Id.* at 1417-18. The court also cited the Indianapolis study and pointed out that adult bookstores project a negative effect on property values a considerable distance from their stores. *See id.* at 1418. The Eighth Circuit also cited a St. Paul study that documented "discarded pornographic literature allegedly found in the streets, sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and...becomes available to minors even though its sale to minors is prohibited." *Id.* The court upheld the ordinance. *See id.* at 1415.

The Tenth Circuit in *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), also relied on the Oklahoma City study and the Indianapolis study, which stated, "even relatively...passive use[s] such as...adult bookstore[s] ..have a serious negative effect on

their immediate environs." *Id.* 687 n.1. The court upheld the ordinance based on this evidence.

The foregoing evidence from *World Wide Video* (9th Cir.), *ILQ Investments* (8th Cir.), and *Z.J. Gifts* (10th Cir.), is particularly relevant because the New Albany City Council explicitly relied upon these decisions and the evidence from these communities. *See* Pet. App. 87a-89a.

State courts have also recognized problems with adult bookstores. For instance, in *People ex rel. Deters v. Lion's Den, Inc.*, No. 04-CH-26 (Ill. Cir. Ct., 4th Cir., Effingham County July 13, 2005), *aff'd* No. 5-05-0413 (Ill. App. Ct. July 28, 2006), *pet. for leave to appeal denied*, 861 N.E.2d 663 (Ill. 2006) (table)[2], an Illinois state trial court enjoined a retail only adult bookstore from being located within a certain distance from a park and a cemetery after evidence of negative secondary effects. In particular, there was litter in the vicinity of the store near the park and cemetery including sexuality explicit magazines and toys. *Id.* at ¶¶ 26-27. The community significantly decreased their use of the park after the opening of the adult bookstore, even by campers and baseball leagues, at least in part due to concerns over safety. *Id.* at ¶¶ 28-29.

That court also credited Dr. Richard McCleary's research, who also testified on New

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[2] The relevant portion of the 43-page order is attached as Appendix A.

Albany's behalf, which showed that "sexually-oriented businesses, including retail-only adult bookstores, pose substantively large and statistically significant crime hazards." *Id.* at ¶ 31. Dr. McCleary advocated the use of

> buffer zones as a means of regulating adult uses...explain[ing] that the relationship between sexually-oriented businesses and crime applies to all business sub-classes, including adult book and video stores that rent or sell materials for off-premises use, and that a principal means of minimizing the crime-related public safety risk is to create distance between the sites and sensitive uses.

Id. at ¶ 32. Dr. McCleary testified that customers of such businesses attract criminals to the areas surrounding such businesses since the customers are strangers to the area, carry significant cash, and, due to concerns about anonymity, do not tend to report crime. As a result, robbery, auto theft, and vandalism increase in those areas. *Id.* at ¶ 33.

Common sense is consistent with the evidence credited by these various courts. Although the Seventh Circuit insisted that it was "paternalistic" to restrict adult businesses due to concerns about customer safety, *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 560 (7th Cir. 2009), such a criticism does not render an ordinance unconstitutional. If it did, most laws,

which are paternalistic in one respect or another, would be unconstitutional. More important, customer safety is not the only concern. Instead, once criminals are attracted to an area, the crime that they bring will not be limited to customers. Therefore, even without conducting additional studies, it is sensible to limit the location of such businesses and prevent them from bringing crime to areas where any victims would congregate—such as residential areas.

Similarly, few would desire to move near an adult bookstore regardless of whether or not it also has peep show booths. Most potential residents would not know what is inside the store when making their assessment of whether to move into an area. A store's presence in a residential or even a commercial area is problematic regardless of what goes on inside. Adult businesses also reflect unfavorably on surrounding commercial enterprises. Therefore, the presence of an adult business is likely to reduce both residential and commercial property values, consistent with the above studies.

Finally, it is hardly "paternalistic" in a pejorative sense for a municipality to look out for the welfare of the children in its community. Even apart from studies linking such businesses with crime (crime that also affects children), concerns about sexually explicit litter is relevant when children are involved. *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing the appropriateness of regulations to limit access

by children to sexually explicit materials). Government plays a vital role in limiting the negative secondary effects of sexually oriented businesses—here by simply controlling the location of such enterprises. Its interest should not quickly be brushed off as imagined in light of the pervasive nature of secondary effects, even for the Respondent's self-defined sub-category of adult bookstore.

II. The Seventh Circuit decision undermines the ability of municipalities to protect against these harms.

This Court stated that significant leeway should be given to municipalities in assessing and responding to harm. The decision below, however, strays from this standard and prevents municipalities from relying on the kinds of evidence described above.

A. The court below strayed from this Court's caselaw.

According to *Renton*, *supra*, restrictions aimed at the negative secondary effects of adult businesses are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47. The Court emphasized that municipalities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.*

at 52 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)).

In *Alameda Books*, *supra*, Justice Kennedy's concurrence reiterated *Renton*'s central themes, including the proposition "that a city must have latitude to experiment" when regulating to prevent secondary effects and "that very little evidence is required." *Alameda Books*, 535 U.S. 425, 451 (Kennedy, J., concurring in judgment). While the plurality cautioned that municipalities cannot rely on "shoddy data or reasoning," *id.* at 438 (plurality opinion), all members reaffirmed *Renton*'s deferential standard, *see id.* at 438 (plurality opinion), 451 (Kennedy, J., concurring in judgment).

In contrast, the Seventh Circuit imposed a new rule requiring a more searching inquiry into the assessment of harm. Notwithstanding the voluminous evidence in New Albany's record, the court suggested that the city "has not established that book and video stores offering only take-home items cause any untoward secondary effects" and claimed that this Court in *Renton* and *Alameda Books* "held that proof of such effects is essential if municipalities regulate adult establishments differently from the way they regulate other similar businesses...." *New Albany DVD*, 581 F.3d at 559.

This Court, however, refused to set a "high bar for municipalities that want to address *merely* the secondary effects of protected speech" and held

"that a municipality may rely on *any* evidence that is '*reasonably believed* to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books*, 535 U.S. at 438 (citing *Renton*, 475 U.S. at 51-52) (plurality opinion) (emphasis added). The plurality went on to cite Justice Souter's concurrence *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), for the proposition that a municipality may use "evidence that *adult theaters* are correlated with harmful secondary effects to support its claim that *nude dancing* is likely to produce the same effects...." *Id.* at 584 (plurality opinion) (emphasis added).

Despite the Seventh Circuit's assertion, therefore, this Court approves of relying on harm from one subclass of adult business to regulate another subclass. New Albany, however, was even more careful and presented evidence of the harms *unique* to retail-only adult businesses, including the evidence described above from *World Wide Video, supra, ILQ Investments, supra,* and *Z.J. Gifts, supra* and the Indianapolis, Oklahoma City, and St. Paul studies. The City also presented studies from Garden Grove, California; Austin, Texas; Whittier, California; and Amarillo, Texas; and an expert report from Dr. McCleary stating that the "on-premise" versus "take-home only" distinction "is irrelevant to measuring the public safety risk posed by" adult businesses. *See* Pet. App. 10, 82a, 88a-89a.

In spite of the extensive evidence presented by New Albany and this Court's caution that "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners," *Alameda Books*, 535 U.S. at 451 (citing *Renton*, 475 U.S. at 51-52) (Kennedy, J., concurring in judgment), the Seventh Circuit determined that there was not sufficient proof of harm from Respondent's sub-category of adult bookstore. *See New Albany DVD*, 581 F.3d at 559-60. Glossing over the City's abundant evidence, evidence that was sufficient for numerous other courts faced with the identical issue, *World Wide Video* (9th Cir.), *ILQ Investments* (8th Cir.), and *Z.J. Gifts* (10th Cir.), the Seventh Circuit mischaracterized this proof as insufficiently broad, *see New Albany DVD*, 581 F.3d at 559, or based only on anecdotes, *see id.* at 560. This Court, however, not only recognized that courts should not second-guess "fact-bound empirical assessments of city planners," *Alameda Books*, 535 U.S. at 451-52, but it recognized that reliance on the "experience of" others is appropriate, *Renton*, 475 U.S. at 50.

Similarly, the Ninth Circuit in *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003), recognized that legislative type bodies may rely on testimonial and anecdotal evidence due to the "nature of the legislative process." *Id.* at 1168.

> A legislative body can act without first acquiring irrefutable proof. In other words, lawmakers need

> not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels. Instead, a legislative body, acting in furtherance of the public interest, is entitled to rely on whatever evidence it reasonably believes to be relevant to the problem at hand.

Id. (quoting *Nat'l Amusements Inc. v. Town of Dedham*, 43 F.3d 731, 742 (1st Cir. 1995)).

The wisdom of deferring to the factual assessments of municipalities is demonstrated by the problems that occur when courts do not. Here the Seventh Circuit's second-guessing of New Albany's legislative judgment lead to misconstruing the legislative evidence. The court completely ignored the adverse impact of adult bookstores on property values, which, as recognized in the *H & A Land Corp.* decision, 480 F.3d at 340, applies equally to retail-only adult bookstores as well as to adult bookstores with peep show booths. The court improperly considered the effects of litter to be insufficient, although the same evidence relied upon by New Albany was considered adequate by other circuits. The court also misunderstood the safety argument, implying that city planners should not separate adult bookstores from places where families congregate because potential victims of crimes can make their own assessments of risk. *See New Albany DVD*, 581 F.3d at 560. Moreover, the Seventh Circuit ignored

the fact that once crime is brought to an area, it spills over to the community at large. *See, e.g., Lion's Den*, ¶ 33.

In concluding that the City's evidence was not sufficient, the Seventh Circuit essentially created a new—and substantially more onerous—evidentiary burden. Instead of considering reliance on studies from other municipalities to be sufficient, *see Renton*, 475 U.S. at 50 (finding the requirement of "studies specifically relating to the particular problems" of a municipality to be "an unnecessarily rigid burden"), the effect of the Seventh Circuit's decision is to demand just the opposite, local evidence. In fact, the court explicitly stated that it is "necessary to know how serious the problem is...in New Albany." *New Albany DVD*, 581 F.3d at 561. The Seventh Circuit suggested that New Albany should conduct an extremely specific, empirical study:

> There are thousands of adult bookstores; it should be easy to find out how much litter they generate, how much of this litter falls into the hands of minors, and whether this is a materially greater problem when one store carries 40% adult books than when lots of stores carry 10% apiece.

Id.

Even if such an empirical study were possible—when Respondent opened, there were no

adult businesses in New Albany—it would be prohibitively expensive to determine specific causation at such a detailed level, and, more important, no study could be done until after the city suffered secondary effects. Small cities do not tend to regulate based on statistics from a single business but based on broader experience elsewhere. Injecting a new burden to conduct an empirical study is directly contrary to the direction of this Court. *See Renton*, 475 U.S. at 50 (disagreeing with the Court of Appeals that "the city's justifications for the ordinance were 'conclusory and speculative' in the absence of "studies specifically relating to 'the particular problems or needs of Renton'"); *Alameda Books*, 535 U.S. at 437-38 (rejecting adult bookstore's argument that the city must perform additional empirical studies to establish nexus between combination adult businesses and crime) (plurality opinion). Indeed, the "First Amendment does not require a city...to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed* to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52 (emphasis added).

Not only did the Seventh Circuit suggest additional local studies, but fearing that speech would be curtailed by merely using the zoning power to restrict the location of such businesses, it stated that the City's interest in preventing sexually explicit litter within a certain distance from other uses, such as residences, can only be

sustained if it can be shown how much litter is produced, who is going to see the litter where such businesses are allowed to operate, and how much litter will remain after regulation. *See New Albany DVD*, 581 F.3d at 561. Not only does this Court not require that level of evidence, but neither does common sense. If sexually explicit litter is found in the proximity of such businesses and if such businesses are moved away from residential areas, it stands to reason that such litter will no longer plague residential areas.

B. The Seventh Circuit's error extends to *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), referenced into the decision below.

The full extent of the Seventh Circuit's departure from this Court's caselaw is found in its *Annex Books* decision, adopted by reference into the decision below seven days after *Annex Books* was filed. *See New Albany DVD*, 581 F.3d at 560-61. The *Annex Books* court insisted that "the City needs evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech." *Annex Books*, 581 F.3d at 462.

The decision in *Annex Books* undermines time, place, and manner restrictions for all types of adult businesses, not just location requirements affecting retail-only adult bookstores. First, the court demanded exacting evidence, finding fault

that "[n]one of the studies...concerns" evidence of specific harm arising out of the hours of operation of adult businesses. *Annex Books*, 581 F.3d at 462-63. Such specificity is not required by this Court's caselaw.

Second, it was not even sufficient to show that there were 41 arrests in a single year for public indecency at an adult bookstore. Instead, according to the court, it was necessary to show that "most of them" occurred during the hours sought to be regulated. *Id.* at 463. Therefore, merely reasoning that there are numerous arrests and that it is harder to police such activities under the cover of darkness is not enough to satisfy the Seventh Circuit's heightened scrutiny.

Third, the court requires municipalities to engage in scientific, comparative analysis, showing that adult businesses are more harmful to the city than bars. *Id.* The issue, however, is not the overall number of arrests at different kinds of businesses, but the extent to which harms can be eliminated in any given context. While this Court requires a city to submit that a law "may reduce the costs of secondary effects," *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring in judgment), there is no duty to engage in comparative analysis to determine whether adult businesses are more or less safe than bars.

None of these new requirements turn on the subclass of adult business being regulated. Instead, these additional evidentiary standards require

endless permutations of evidence even when there are known secondary effects. Because of the breadth of what is demanded, the court's new requirements jeopardize enforcement of all adult business regulations.

C. If New Albany's extensive evidence is insufficient, then municipalities' efforts at protecting against adult businesses will be undermined.

If the decision below is allowed to stand, then contrary to the direction of this Court, lower courts will constantly second-guess the "fact-bound empirical assessments" of local governments, *Alameda Books*, 535 U.S. at 451-52 (Kennedy, J., concurring in judgment), requiring endless numbers of studies and reports to demonstrate that each unique subclass of adult business causes harm greater than non-adult businesses and that the regulation is certain to correct the problem. Municipalities cannot be expected to meet such an onerous and unreasonable burden. Instead, many municipalities will simply cease to regulate. Ultimately, it is necessary that this Court address this issue to properly balance competing interests and return certainty to the law so that municipalities can regulate the location of adult businesses to separate the secondary effects they generate from sensitive areas and families who congregate there.

1. Municipalities will not be able to comply with this new burden.

The practical demands of local regulation prevent municipalities from focusing on endless numbers of individualized situations. Instead, local governments typically attempt to regulate comprehensively due to related harms and in a way that generally benefits the community—even if regulation may not be necessary for each and every individual or person affected.

The same is true with regards to adult business regulations. Typically a municipality does not regulate only adult bookstores or only nude dancing, but seeks to limit the harms common to sexually oriented businesses. Regulations, however, would be nearly impossible if local governments were forced to break down their regulations according to endless subclasses of adult businesses based on ever-varying industry practices. The Seventh Circuit's standard suggests that endless studies must be done of any subset of admittedly adult businesses that may challenge an ordinance. Based on this notion, entirely new studies would need to be done in each municipality.

The Sixth Circuit recognized the error in this approach:

> Requiring local governments to produce evidence of secondary effects for all categories created by every

> articulable distinction is a misapprehension of the Supreme Court's holding that governments may rely on any evidence "reasonably believed to be relevant." *Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. 1728 (stating that the city need not demonstrate that "adult department stores" produce the same secondary effects as "adult minimalls")...

Richland Bookmart, Inc. v. Knox County, Tenn., 555 F.3d 512, 526 (6th Cir. 2009). The *Richland Bookmart* court also cited a prior Seventh Circuit case, *G.M. Enters. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003), for the same proposition.

Ultimately municipalities would not be able to regulate comprehensively because even if they had studies about the effect of adult theaters, for instance, they may not have evidence of the effects of nude dancing. However, this Court has recognized that it is appropriate to rely on evidence from other kinds of adult businesses. *See Alameda Books*, 535 U.S. at 438 (plurality opinion) (citing *Barnes*, 501 U.S. at 584-85 (Souter, J., concurring in judgment)). Justice Souter explained in *Barnes* that the

> type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton*, *American Mini Theatres*, and *LaRue*. It therefore is no leap to say that live

> nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects.... Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case.

Barnes, 501 U.S. at 584 (Souter, J., concurring in judgment).

Pursuant to the Seventh Circuit opinion, however, municipalities are essentially being asked to provide additional and specific evidence of harm and, by extension, to continue to re-litigate the issue of whether it is good enough. Moreover, if the extensive evidence of harm compiled by New Albany is not sufficient, the message to municipalities is clear: regulation is untenable. The end result is that communities are forced to suffer the negative secondary effects of adult businesses.

2. Many municipalities will cease to regulate due to fear of litigation.

The decision of the Seventh Circuit raises the specter of uncertainty and costly litigation to municipalities who wish to regulate. Unless a municipality is certain that a court will view their

evidence in the same way that they do, many municipalities will cease to regulate.

While municipalities should be able to rely on others' experience, *see Renton*, 475 U.S. at 51, New Albany was not able to do so. Instead, the experiences of other cities, which were adequate for other Circuit Courts, *see World Wide Video* (9th Cir.), *supra, H&A Land Corp.* (5th Cir.), *supra, ILQ Investments* (8th Cir.), *supra, Z.J. Gifts* (10th Cir.), *supra*, and *Richland Bookmart* (6th Cir.), *supra* were deemed insufficient by the Seventh Circuit. If New Albany and other cities cannot rely on studies, anecdotal evidence, judicial findings, and expert testimony previously deemed sufficient by courts, cities are likely to refrain from regulations while their citizens bear the burden of the court induced inaction.

D. The Seventh Circuit's rule does not properly balance the competing interests.

A more stringent standard, such as the rule developed by the Seventh Circuit, is not well suited to balancing First Amendment interests with the evident harms of adult businesses. This Court has been clear that unlike with core political speech, only the outside limits of the First Amendment are implicated by regulation of businesses specializing in sexually explicit fair. *See, e.g., City of Erie v. Pap's A.M* , 529 U.S. 277, 289 (2000) (stating that nude dancing "falls only within the outer ambit of the First Amendment's protection") (plurality

opinion); *Barnes*, 501 U.S. at 565-66 (finding nude dancing to be "only marginally" within "the outer perimeters of the First Amendment") (plurality opinion); *American Mini Theatres*, 427 U.S. at 70 ("society's interest in protecting" materials that are "erotic" and "arguably artistic" is "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate") (plurality opinion).

Since the harms of adult businesses are significant and since the interests of adult businesses have little to do with "having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause," *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968), the best course of action is to give municipalities latitude and deference in assessing secondary effects and crafting solutions. Since even core political speech can be limited by reasonable place restrictions, this Court should take the opportunity to reaffirm that local governments may protect their citizens by limiting the locations of adult businesses based on some evidence "reasonably believed to be relevant to the problem that the city addresses," *Renton*, 475 U.S. at 51-52. Otherwise we may be faced by the anomaly that adult businesses, which are only protected by the outside limits of First Amendment, receive more protection than core political speech.

E. Municipalities and the communities they protect need the clarity of a reaffirmation of *Renton*.

Municipalities need direction from this Court in order to protect their communities from negative secondary effects of adult businesses. They need clarity, stability, and a common sense standard like that of *Renton*.

Without clarity, municipalities constantly risk litigation. As stated above, the cost of litigation and the risk of loss will drive many municipalities to back down and fail to protect their residents. Not only is clarity needed, but so is stability. Municipalities for decades have built their ordinances around an understanding that *Renton* is the controlling standard. This standard cannot change without bringing harm to those municipalities that relied on the *Renton* rule. *See Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (stating that the "inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application"). In fact, not only are municipalities relying on this rule, but numerous states have laws regulating the secondary effects of adult businesses.[3] If the Seventh Circuit's decision

[3] Various states have adopted laws regarding distances from adult businesses *See* Ariz. Rev Stat § 13-1422(A), O C G A § 36-60-3; 65 Ill. Comp Stat 5/11-5-1 5, N J. Stat Ann § 2C.34-7, S.D C L § 11-12 2, Tenn Code Ann § 7-51-1407(a)(1).

were allowed to stand, state and local governments would no longer have the benefit of consistency and predictability in this area of the law but may actually be forced to repeal laws until a clear rule is announced.

Municipalities would benefit from a reaffirmation of the core principles of *Renton*, namely: 1) that municipalities can rely on any evidence "reasonably believed to be relevant," 475 U.S. at 51-52, 2) that they can rely on what was "already generated by other cities," *id.* at 51, 3) that no study needs to be particularized to the municipality itself, *id.* at 50, and 4) that the evidence need not be an exact match to the situation at hand, *Alameda Books*, 535 U.S. at 438 (plurality opinion). This will renew the straightforward rule on which municipalities have relied for years.

CONCLUSION

For the foregoing reasons, your *amici* urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: March 19, 2010

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APPENDIX 1

EXCERPT FROM:

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT EFFINGHAM COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* EDWARD C. DETERS, State's Attorney of Effingham County, **Plaintiff,** **vs.** **THE LION'S DEN, INC., a foreign business corporation incorporated in the State of Ohio; EFFINGHAM RETAIL 27, INC., a foreign business corporation incorporated in the State of Ohio; MICHELLE MOORE; and REAL ESTATE located at 401 Frontage Road, in the Village of Montrose, Effingham County, Illinois,** **Defendants.**	No.. 04-CH-26 **MODIFIED PERMANENT INJUNCTION ORDER**

FILED: July 13, 2005

***

E. Evidence of impact on surrounding vicinity

24. Ms. Woolridge testified that the principal clientele of the Lion's Den store in Montrose, Illinois, are truck drivers coming off Interstate 70. She further testified that customers frequently are allowed to view sexually explicit DVDs in the store on the manager's computer monitor. Ms. Woolridge indicated that on two occasions she was sexually propositioned by customers while working at the store, once in the late summer, 2003, and once in March, 2004. She also testified that on one occasion she had to run off two customers whom she suspected of engaging in sexual activity in a truck parked in the store's parking lot. She stated that store management discouraged her from reporting such incidents to the state police. Although her employment at the Lion's Den store had been terminated, Ms. Woolridge was a credible witness.

25. Ron Kilman, an investigator for the Effingham County State's Attorney's Office, provided credible testimony regarding his investigation of the Lion's Den store in Montrose, Illinois. On April 26, 2004, he entered the store and purchased various sexually explicit items, which he stated were typical of the items offered for sale there. These items were admitted into evidence as Plaintiff's Exhibits 1, 2, 3, 4 and 5. Also admitted into evidence, as Plaintiff's Exhibits 6 and 7, were the receipt and return policy he received from the store.

26. Some time later, approximately three weeks prior to the hearing on July 1, 2004, Mr. Kilman returned to and observed the areas surrounding the Lion's Den store in Montrose, Illinois. In the drainage ditches along the roadways near the store, in close proximity to the Village of Montrose Park and Montrose Cemetery, Mr. Kilman found numerous items of litter, including sexually explicit magazines and sex toys, which had been sold at the Lion's Den store. These items were admitted into evidence as Plaintiff's Exhibits 9 through 18. Mr. Kilman also took 6 photographs of the Lion's Den property from the Village of Montrose Park and Montrose Cemetery, which were admitted into evidence as Plaintiff's Group Ex. 8.

27. Barb Gillam, a resident of Montrose for the past 10 years, has openly expressed her disapproval of the Lion's Den store, but she provided credible testimony that she found several items of litter from the store in or near the Village of Montrose Park and Montrose Cemetery. These items were admitted into evidence as Plaintiff's Exhibits 20, 21, 22 and 23. On June 17, 2004, she found Plaintiff's Ex. 20, a sexually explicit magazine, in a trash can in the park near where the children's playground equipment is located. On August 21, 2004, she found Plaintiff's Exhibits 21, 22 and 23 in a roadway ditch near the cemetery. Plaintiff's Ex. 21 consists of two magazines containing numerous full-frontal photographs of nude men, some displaying erect penises. Plaintiff's

Exhibits 22 and 23 are sexually explicit video tapes.

28. Lylah Flach, a resident of rural Montrose, testified that her family had frequently used the Village of Montrose Park prior to. the opening of the Lion's Den store, but due to her concerns for the safety of her children, she no longer permits them to do so, because of the close proximity of the store.

29. Dennis Fletcher, who is the president of the Village of Montrose, as well as the caretaker of the Village of Montrose Park, provided credible testimony that there has been a marked decline in the public's use of the park, including the cancellation of organized baseball leagues and a substantial reduction in usage by campers, since the Lion's Den store began operations. Similar observations were made by Mrs. Gillam and Mrs. Flach.

F. Secondary effects of adult entertainment facilities

30. Dr. Richard McCleary, an expert witness hired by the Plaintiff, testified regarding the secondary effects of crime and public safety risks associated with sexually-orientated businesses. Dr McCleary is a professor of social ecology at the University of California-Irvine, where he holds joint appointments from the Department of Criminology and the Department of Planning, in which he teaches graduate level courses. He also

sits on the boards of several leading journals in the field of criminology. He has a Bachelor of Science in mathematics from the University of Wisconsin, a Master of Arts in statistics from Northwestern University, and a Ph.D. in sociology from Northwestern University. His curriculum vitae was admitted into evidence as Plaintiffs Exhibit 25A.

31. Dr. McCleary testified that scientific research (including his own) consistently shows that sexually-oriented businesses, including retail-only adult bookstores, pose substantively large and statistically significant crime hazards. He personally has conducted research on this issue since 1977. His testimony was credible and convincing.

32. As to the issue of using buffer zones as a means of regulating adult uses, Dr. McCleary explained that the relationship between sexually-oriented businesses and crime applies -to all business sub-classes, including adult book and video stores that rent or sell materials for off-premises use, and that a principal means of minimizing the crime-related public safety risk is to create distance between the sites and sensitive uses.

33. In addressing crime as a secondary effect of sexually-oriented businesses, Dr. McCleary explained why patrons of such establishments are considered, from a criminological perspective, to be "soft targets" for predatory criminals. Patrons of erotic businesses generally come from outside the

area and thus are strangers to the local vicinity, they take steps to maintain anonymity (i.e., they often carry large amounts of cash for purchases), and are more reluctant to report victimization. Dr. McCleary testified that the presence of soft targets draws criminals who commit predatory crimes (robbery, auto theft, vandalism, etc.) and crimes of opportunity, and that potential victimization extends beyond the immediate site into the surrounding area.

34. Dr. McCleary based his opinions, in part, on numerous prior studies which have documented the adverse secondary effects of sexually-oriented businesses. Those studies included the following cities, reports from which were admitted into evidence: Amarillo, Texas (Exhibit 27); Whittier, California (Exhibit 28); Phoenix, Arizona (Exhibit 29); Minneapolis, Minnesota (Exhibit 30); Indianapolis, Indiana (Exhibit 31); Austin, Texas (Exhibit 32); Garden Grove, California (Exhibit 33); Centralia, Washington (Exhibit 35); and St. Paul, Minnesota (Exhibit 36).

35. The Garden Grove study (Exhibit 33) was personally conducted by Dr. McCleary, along with James Meeker, J.D., Ph.D. Together they examined the crime rates both before and after a sexually-oriented business opened its doors. They found a sixty-five to seventy percent increase in serious crime following the opening of a sexually-oriented business.

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MOTION FILED

MAR 2 2 2010

No. 09-1027

In The
Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,
Petitioner,

v.

NEW ALBANY DVD, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* AND MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The International Municipal Lawyers Association ("IMLA") urges this Court to grant it leave to appear in this case as *amicus curiae* in support of Petitioner, the City of New Albany, Indiana.[1] At stake in this case is the essential right of all municipalities to zone sexually oriented businesses to locations that are away from houses of worship, parks, schools, residences, and other sexually oriented businesses.

IMLA is a nonprofit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court,

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no part of this brief was authored by counsel for either party. No person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received notice at least 10 days before the due date of this brief. The City's written consent to the filing of this brief is filed with the Clerk's office. DVD objects to the filing of this brief, and therefore, *amicus curiae* files this motion for leave to appear in this case.

in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's local government members are the entities most-affected by federal appellate court decisions involving the regulation of sexually oriented businesses and their secondary effects. Local governments are the entities charged with the duty of responsibly governing the communities within which sexually oriented businesses are located, and they are responsible for addressing the adverse secondary effects that these businesses create. Thus, IMLA has a compelling interest in the development of the law governing the regulation of sexually oriented businesses. The subject of this case -- the evidentiary burden that a local government must meet in order to enact an ordinance that zones sexually oriented business uses -- is, therefore, of the utmost importance to IMLA and its members.

When adopting its zoning regulations prohibiting sexually oriented businesses from operating within certain distances from each other and from houses of worship, parks, schools, and residences, the City relied upon numerous studies, reports, testimony, judicial decisions, eyewitness observation, and other evidence regarding the adverse secondary effects of sexually oriented businesses. Despite the plethora of evidence that the City relied upon, the Seventh Circuit concluded that the City failed to adequately support its regulations because it did not rely upon evidence of adverse secondary effects caused by the *specific type* of sexually oriented business that Respondent, New Albany DVD ("DVD"), desired to operate. In essence, the Seventh Circuit mandated that when adopting zoning regulations, local governments must find and

rely upon evidence of adverse secondary effects caused by each and every conceivable type of sexually oriented business; and if a local government fails to introduce evidence of adverse secondary effects of any specific type of sexually oriented business, the local government cannot regulate, through its zoning power, that specific type of sexually oriented business. The Seventh Circuit's holding significantly impedes the exercise of reasonable legislative predictive judgment and local governments' efforts and ability to balance the needs of providing ample area for sexually oriented businesses to locate on the one hand and for protecting citizens from secondary effects on the other hand. Additionally, the holding undermines and conflicts with precedent established by this Court.

These effects impact municipalities nationwide, and therefore, *amicus curiae*, the International Municipal Lawyers Association, requests leave to appear. The following brief is filed in support of the City's plea to this Court to accept jurisdiction over this case.

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BACKGROUND AND SUMMARY OF THE ARGUMENT

This case involves the constitutionality of two traditionally-designed *zoning* ordinances (hereinafter collectively referred to as "ordinance") adopted by Petitioner, the City of New Albany ("City"), as applied to an adult bookstore ("DVD"). Like most traditionally-designed zoning schemes utilized around the country, the City has chosen to permit particular land uses by zoning category. The ordinance at issue here provides that sexually oriented businesses, as a category of commercial business, are a permitted use in several zoning categories including: C-2 (General Business), C-3 (Regional Shopping Center), I-1a (Light Industrial), I-1b (Light Industrial Park), and I-2 (Heavy Industrial). The ordinance further provides that a sexually oriented business must not be located 1,000 feet from any house of worship, day care center, public or private elementary or secondary school, residential district, and any other sexually oriented business. The ordinance also prohibits a sexually oriented business from locating within 500 feet of any dwelling.

The City recognized that the known adverse secondary effects of sexually oriented businesses include "crime, blight, litter, and the downgrading of property values." The City sought to combat these negative secondary effects and to "preserve the quality

of life and the urban setting . . . and character of surrounding neighborhoods" in its community, by adopting zoning regulations that govern where sexually oriented businesses may operate. In passing its zoning regulations, the City relied upon numerous studies, reports, and materials detailing the negative secondary effects of sexually oriented businesses. The City also relied upon numerous judicial decisions upholding regulations pertaining to sexually oriented businesses, including decisions rendered by this Court. Specifically, the City relied upon this Court's decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) for the important *zoning* proposition that local governments have a substantial interest in regulating the location of sexually oriented businesses.

The City denied DVD's zoning permit application to operate a sexually oriented business for the sole reason that its location does not comply with the ordinance because it is within: (1) 175 feet of a church, (2) 115 feet of a residential district, and (3) adjacent to a dwelling. In an effort to circumvent the City's zoning regulations, DVD challenged the ordinance and sought a preliminary injunction. DVD claimed the ordinance violated its First Amendment rights because the ordinance is based on the books' and videos' content or subject matter and because the City did not justify that it had a substantial government interest in regulating adult bookstores that do not have peep show booths. Importantly, DVD did *not* contend that the City's zoning scheme infringes upon its First Amendment rights because it offers an insufficient number of available sites to operate. To the contrary, as noted by the Seventh Circuit in its decision, DVD did not challenge the City's contention that "more land

is available for adult establishments than is put off limits by this ordinance." *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 559 (7th Cir. 2009).

The district court held an evidentiary hearing and found that the City's evidence identified adverse secondary effects and demonstrated that the City had a substantial government interest in remedying those secondary effects. The district court also found that the studies the City relied upon in enacting the ordinance are relevant to the regulation of secondary effects, including crime. Further, the district court found that DVD's evidence did not, under the shifting burden test set forth in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (plurality opinion), cast "direct doubt" on the City's rationale for the ordinance. Nevertheless, the district court granted the injunction, finding that the ordinance was not narrowly tailored to prevent the harms identified in the City's evidence. The district court concluded that the ordinance was not narrowly tailored because: (1) the ordinance broadly restricts adult businesses from locating near dwellings, but not specifically occupied dwellings; and (2) rather than imposing distance requirements from houses of worship, the ordinance could restrict the adult businesses' hours of operation to exclude Sundays or times when the houses of worship are in service.

DVD appealed the district court's decision to the Seventh Circuit. The Seventh Circuit started its analysis by essentially rejecting the district court's narrowly tailored rationale, opining that the narrowly tailored standard "does not mean that the ordinance must be the least restrictive possible regulation." *New Albany*, 581 F.3d at 559. The Seventh Circuit also

indicated that "[w]hen some regulation is justified, a city has considerable discretion on matters of detail. The sort of zoning rule that New Albany enacted has been too widely used, and too often sustained, to be upset as 'not narrowly tailored.'" *Id.* at 559. Despite those conclusions, the Seventh Circuit upheld the injunction and prevented the City from enforcing the location requirement in the ordinance.

Relying on and incorporating its recent decision in *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), the Seventh Circuit found that the City had not introduced any evidence demonstrating that adult book stores without peepshow booths cause adverse secondary effects. *Annex Books* holds that under intermediate scrutiny, "to prevail, the City needs evidence that the restrictions actually have a public benefit great enough to justify any curtailment of speech." *Id.* at 462. In order to reach this conclusion, the Seventh Circuit ignored all of the evidence that the City reasonably relied upon in adopting the ordinance, including evidence that sexually oriented businesses, as a category of commercial business, cause "crime, blight, litter, and the downgrading of property values."

The Seventh Circuit's heightened evidentiary standard conflicts with the "reasonably believed to be relevant" standard announced in *Renton* and reiterated in *Alameda Books*. Additionally, this heightened evidentiary standard -- coupled with the court's acknowledgment that New Albany has "more land . . . available for adult establishments than is put off limits by this ordinance" -- impedes the implementation of traditional zoning ordinances

regulating sexually oriented businesses, such as those upheld by this Court in *Young* and *Renton*.

The City of New Albany's petition should be granted for three independent reasons. First, the Seventh Circuit added an interpretive heightened evidentiary burden to the "reasonably believed to be relevant" standard used to justify sexually oriented business zoning ordinances. It held that in order for a city "to prevail, the city needs evidence that the restrictions actually have a public benefit great enough to justify any curtailment of speech." *See New Albany*, 581 F.3d at 560 (citing *Annex Books*, 581 F.3d 460). This holding is contrary to *Renton* and its progeny. Second, by increasing the evidentiary burden, the Seventh Circuit's decision requires citizens to suffer secondary effects of sexually oriented businesses before a legislative body can take action to ameliorate such effects. This defies common sense, reason, and this Court's precedent. It also threatens cities' long-established use of traditional "Euclidean-style" zoning regulations as a means of preventing the adverse secondary effects of sexually oriented businesses by dispersing those businesses away from houses of worship, parks, schools, residences, and other sexually oriented businesses. *See Village of Euclid v Ambler Realty Co.*, 272 U.S. 365 (1926) (decision of this Court upholding the early zoning concept of separating incompatible land uses; this type of zoning thereafter became known as "Euclidean-style" zoning). Third, the Seventh Circuit's decision diverges from this Court's precedents and exacerbates the split amongst the circuit courts of appeal over the requirements of *Alameda*.

ARGUMENT

I. THE SEVENTH CIRCUIT'S RULING MISTAKENLY INCREASED THE EVIDENTIARY BURDEN THAT GOVERNMENTS MUST SATISFY WHEN ENACTING SEXUALLY ORIENTED BUSINESS ZONING REGULATIONS SO THAT THOSE REGULATIONS DO NOT INFRINGE UPON RIGHTS PROTECTED BY THE FIRST AMENDMENT.

While a municipality cannot use a zoning regulation as a pretext to ban or suppress speech, the Court has recognized that a municipality's use of its zoning power "to preserve the quality of urban life is one that must be accorded high respect." *See Renton*, 475 U.S. at 50 (quoting *Young*, 427 U.S. at 71). In this context, the Court has analyzed zoning ordinances regulating the location of sexually oriented businesses as a time, place, and manner regulation. *Id.* at 46. This Court has applied intermediate scrutiny and has upheld "content neutral" zoning ordinances that are aimed at the secondary effects of such businesses, when it is demonstrated that the ordinances serve a substantial government interest and allow for reasonable alternative avenues of communication. *Renton*, 475 U S. at 47.

In *Renton*, this Court reversed the Ninth Circuit and declared valid a zoning ordinance that prohibited an adult motion picture theater from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school. The Ninth Circuit had invalidated the zoning ordinance because the city failed to produce empirical evidence

specifically relating to "the particular problems or needs of Renton." *Id.* at 50. This Court found that the Ninth Circuit "imposed on the city an unnecessarily rigid burden of proof," and concluded that the city's reliance upon only a single opinion of the state supreme court in which the related experiences of the city of Seattle with adult theaters was thoroughly discussed was sufficient to demonstrate Renton's substantial government interest in regulating adult theaters. *Id.* at 50-51.

This Court held:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Id. at 51-52.

After *Renton*, this Court has on several occasions refused to impose a stringent evidentiary burden on cities attempting to mitigate against the secondary effects of sexually oriented businesses, and has maintained that a city "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between the speech and a substantial, independent government interest." *See Alameda Books*, 535 U.S. at 439 (reliance on one 1977 study by city's planning department); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (reliance on two Supreme Court cases and over a century of city council findings); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560

(1991) (no legislative record, but reliance on judicial opinions during litigation).

Furthermore, in *Alameda Books*, the plurality opinion, authored by Justice O'Connor, clearly rejected the argument made by the dissent that empirical evidence was required in order to demonstrate that the government had a substantial governmental interest in regulating a particular form of adult entertainment. *Alameda Books*, 535 U.S. at 438-42. Also, the Court rejected the notion that the government must prove that its theory about the evidence of secondary effects is the only plausible explanation for the evidence. *Id.* In his concurring opinion, Justice Kennedy also refused to require a municipality to present empirical evidence to support its regulation. Although Justice Kennedy emphasized that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion," *Id.* at 449 (Kennedy, J. concurring), he also stated that the Court has consistently opined that "a city must have latitude to experiment, at least at the outset, and that very little evidence is required." *Id.* at 451 (Kennedy, J., concurring) (citing *Renton*, 475 U.S. at 51-52). In addition, Justice Kennedy concluded "[a]s a general matter, courts should not be in the business of second-guessing fact bound empirical assessments of city planners," and that cities are "entitled to rely on that knowledge" and reasonable inferences from that knowledge in adopting adult entertainment regulations. *Id.* at 451-52 (Kennedy, J., concurring).

While the Court in *Alameda Books* outlined a burden-shifting *procedural* framework for analyzing whether *Renton's* minimal burden is met, and stated that a legislative body cannot rely on "shoddy data or

reasoning," the Court did not increase the "reasonably believed to be relevant" evidentiary standard enunciated in *Renton*.

Even though this Court has consistently upheld the "reasonably believed to be relevant" evidentiary standard enunciated in *Renton*, the Seventh Circuit found in this case that the City's extensive record of adverse secondary effects of sexually oriented businesses was not sufficient to sustain the constitutionality of the City's zoning ordinance that mandated that a sexually oriented adult bookstore be separated from houses of worship, parks, schools, residences, and other sexually oriented businesses. In fact, the Seventh Circuit did not even mention the "reasonably believed to be relevant" standard in its decision in this case, and imposed an additional evidentiary burden that requires the City to produce evidence that its zoning ordinance "actually" has "a public benefit great enough to justify any curtailment of speech." In essence, the Seventh Circuit is asking the City to demonstrate with certainty the exact outcome and consequences the zoning ordinance will have; that task is virtually impossible in the legislative arena, especially during the process of enacting a new law. This heightened evidentiary burden has no judicial anchor in any of the Court's precedents, and threatens to dramatically misdirect future secondary-effects cases away from the procedural and substantive requirements set forth in *Renton* and *Alameda Books*. Accordingly, the Seventh Circuit's decision should be reviewed and reversed.

II. THE SEVENTH CIRCUIT CAST ASIDE THE FUNDAMENTAL PRINCIPLE THAT LEGISLATIVE BODIES CAN ACT BASED ON REASONABLE PREDICTIVE LEGISLATIVE JUDGMENTS. AS A RESULT, THE SEVENTH CIRCUIT'S DECISION CAUSES CITIZENS TO SUFFER THE SECONDARY EFFECTS OF SEXUALLY ORIENTED BUSINESSES BEFORE LEGISLATIVE BODIES CAN TAKE ACTION TO AMELIORATE THOSE EFFECTS THROUGH THE USE OF ZONING.

The Seventh Circuit's decision threatens one of the most essential and critical tools that cities have to mitigate against the secondary effects of sexually oriented businesses: the ability, through their police power, to enact local zoning ordinances that regulate the *location* of sexually oriented businesses, before the public is forced to suffer the harm of those secondary effects.

When ruling that municipal police power justifies the enactment of zoning ordinances, courts have pointed to the need to prevent congestion, to secure quiet residential districts, and to procure an orderly segregation of industrial, commercial, and dwelling areas brought about by the constantly increasing density of urban populations, the multiplying forms of industry, and the growing complexities of civilization. 1 Rathkopf's The Law of Zoning and Planning § 1:2 (4th ed.). As early as 1926 in *Village of Euclid v. Ambler Realty Co.*, this Court recognized, as a valid exercise of municipal police power, a municipality's right to adopt a zoning ordinance classifying general land uses in a particular area in specific enumerated zoning categories. *Euclid*, 272 U.S. 365 (1926). In *Euclid*,

this Court found that the village had "substantial" and "sufficient" justifications for adoption of the zoning ordinance, including:

> promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops and factories.

Id. at 391-93.

Over the years, this basic zoning principle of prescribing by ordinance definite zoning district categories (such as residential, commercial, and industrial), and classes and subclasses of land uses allowed within such categories – which was upheld by this Court in *Euclid* -- became known as "Euclidean Zoning." *See, e.g.*, 1 Rathkopf's The Law of Zoning and Planning § 10:2 (4th ed.). Euclidean Zoning is a very prominent and indispensable planning tool that is used throughout the country, including in the City of New Albany, to establish an appropriate place for all kinds of uses.

In Village of Belle Terre v. Borras, this Court reaffirmed the validity of Euclidean Zoning, stating: "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay

out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Borras*, 416 U.S. 1 (1974). Further, this Court opined that "[a] zoning ordinance usually has an impact on the value of property which it regulates. *Id.* at 9.

Over the past 40 years or so, municipalities have extensively relied on the principles of Euclidean Zoning to pro-actively regulate the location of sexually oriented businesses in order to combat by preemptive strike the secondary effects of such businesses on the community. This effort has generated an extraordinary amount of litigation in state and federal courts. Indeed, this Court has on several occasions addressed the location of sexually oriented businesses in the context of municipal zoning powers. With the exception of *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which involved a city's failure to justify a *total ban* on live entertainment, this Court has consistently upheld cities' exercise of their zoning power to assign sexually oriented businesses to certain areas.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), two adult motion picture theaters brought an action challenging a zoning ordinance adopted by the City of Detroit that applied to theaters that presented materials emphasizing specified sexual activities and anatomical areas. The zoning ordinance prohibited such theaters from locating within 1,000 feet of certain regulated uses and 500 feet from residential areas. Recognizing "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems" and that "the city's interest in attempting to preserve the

quality of urban life is one that must be accorded high respect," this Court held that the City "may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70-71.

The Court reviewed another zoning ordinance that imposed locational requirements on adult motion picture theaters in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the Court upheld a zoning ordinance that prohibited adult theaters from locating within 1,000 feet of any residential zone, park, or school. While *Renton* is often cited for the "reasonably believed to be relevant" evidentiary standard regarding secondary effects, *Renton* is also an example of the legislative deference that the Court has given to cities to make difficult zoning decisions regarding the "admittedly serious problems" occasioned by the location of sexually oriented businesses when there are "reasonable alternative avenues of communication." *Id.* at 53-55 ("It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same area . . . .").

Lastly in *City of Los Angeles v. Alameda Books, Inc.*, an adult bookstore/video arcade challenged a zoning ordinance that required adult entertainment establishments from being within 1,000 feet from other such establishments or within 500 feet of religious institutions, schools, or public parks. After the city closed a loophole that allowed multiple businesses to operate under one roof, the ordinance also had the effect of forbidding the combination of more than one adult use from being located in a single building. Consequently, the adult businesses were required to

split the two kinds of businesses and operate them at different locations. Again, this Court deferred to the city's local zoning judgment and upheld the dispersal requirement. *Alameda Books*, 535 U.S. at 440 (acknowledging "that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on a local problem").

This Court has repeatedly recognized the importance of local zoning power to preserve the quality of life. And, this Court has preserved the "essence" of this power in cases where a city has attempted to ameliorate the secondary effects of sexually oriented businesses by pro-actively "[making] some areas available for [sexually oriented businesses] and their patrons, while at the same time preserving the quality of life in the community at large by preventing the businesses from operating in other areas." *See City of Renton*, 475 U.S. at 54. The Court has also looked favorably upon a city's substantial interest in choosing between two zoning strategies for the location of sexually oriented businesses; the Court has opined that the city can either "concentrate businesses for a concentrated regulatory strategy, or disperse them in order to spread out its regulatory efforts." *See Alameda Books*, 535 U.S. at 465 (Souter, J., dissenting) (recognizing that the Court held in *Renton* and *Young* that municipalities can concentrate adult entertainment businesses or disperse them).

Here, the Seventh Circuit, faced with reviewing a zoning ordinance that is "widely used" and "often sustained," found that the City's evidence of secondary effects failed to justify the use of traditional zoning principles to require that retail-only sexually oriented businesses be located away from houses of worship,

schools, parks, and residences. The Seventh Circuit commented negatively about the City's evidence regarding "litter" and "theft," but did not address in any fashion whatsoever the City's other evidence that justifies the zoning location restrictions imposed as a means of preserving "the quality of life and the urban setting; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight." For example, the Seventh Circuit disregarded the testimony of reknown secondary effects expert Dr. Richard McCleary, who testified that the data imported into the ordinance established an adequate factual predicate for the law.[2] (Petitioner's Brief, App. B, p.23a). And, the Seventh Circuit discounted the City's reliance upon *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004). *World Wide Video* also involved the zoning of a retail-only adult store. In *World Wide Video*, the Ninth Circuit found that the city, through testimonial evidence, demonstrated that retail-only sexually oriented stores had negative "economic and aesthetic impacts upon neighboring properties and the community as a whole." *Id.* at 1197-98. The City's reliance upon Dr. McCleary's testimony and *World*

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[2] After the hearing in the district court and prior to Seventh Circuit's decision, Dr McCleary published two articles corroborating the criminological theoretical expectation that off-site/retail sexually oriented businesses generate the same crime-related secondary effects expected for on-site sexually oriented businesses Richard McCleary, *Crime Related Secondary Effects, Secondary Effects of "Off-Site" Sexually Oriented Businesses* (June 2008) (printed as Part II of Report of the Texas City Attorneys Ass'n), Richard McCleary and Alan C Weinstein, *Do "Off-Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence*, 31 Law & Policy No 2 (Apr 2009)

Wide Video should have provided a sufficient basis for the Seventh Circuit to rule in favor of the City in this case. *See Alameda Books*, 535 U.S. at 465 (Souter, J., dissenting) ("The limitations on location required no further support than the factual basis tying location to secondary effects."). The Seventh Circuit should have considered "all" of the evidence the City relied upon to adopt the ordinance, including the City's reliance upon Dr. McCleary's testimony and *World Wide Video*. Further, rather than substitute its judgment for that of the City's legislative body, the Seventh Circuit should have given the City's "inferences" and findings regarding this evidence more deference because of the City's right to pro-actively exercise its legislative judgment to address secondary effects by use of its zoning power.

This Court has long recognized the power of legislative bodies to base regulatory decisions on predictive judgments. "A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it." *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997). This principle is even more applicable in the context of a time, place, and manner zoning regulation because content neutral regulations "do not impose the same 'inherent dangers to free expression' that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Id.* at 213 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994)).

Not surprisingly, when the Seventh Circuit cast aside this fundamental principle, it prevented the City

from making predictive legislative judgments on the basis of reasonably relevant evidence of secondary effects. This holding puts cities in a "catch-22"; if the sex industry creates a new subclass of sexually oriented business, cities will not have any actual evidence upon which to rely to regulate the new subclass because the evidence is non-existent until that subclass operates. Under the Seventh Circuit's reasoning, a city will have to wait for the secondary effects to occur before it can attempt to classify the use, like it does for other sexually oriented businesses in its zoning scheme. By then, the secondary effects will have already adversely affected the city and its citizens. The Seventh Circuit would have the city and its citizens first suffer the secondary effects, and thereafter attempt to regulate the business and reverse the secondary effects.

The practical land-planning problem with this rigid rule, from a zoning perspective, is that a city will have to suffer an avoidable harm and then either permanently live with the harm, or force the sexually oriented business to relocate to another location in order to prevent the harm from occurring. Of course, the latter approach would create many additional complicated legal issues that could expose a city to tremendous liability Many cities do not have the resources to engage such a battle, and therefore, would be forced to endure the secondary effects rather than face the legal consequences of trying to ameliorate them. This judicially created "catch-22" can be avoided if the city's ability to make predictive legislative zoning judgments is not saddled with a rigid evidentiary rule like the one imposed by the Seventh Circuit. There is no basis in law, reason, or common sense for this illogical rule.

Many cities across the country – like the City of New Albany in this case – have, throughout the years, exercised reasonable legislative judgment and employed Euclidian Zoning principles to adopt *Renton* and *Young*-type locational standards for sexually oriented businesses as a class of commercial use. *See, e.g.*, Municode.com (containing electronic copies of hundreds of city and county zoning codes across the United States). Many of these cities have diligently relied on the deferential "reasonably believed to be relevant" evidentiary standard in good faith to locate sexually oriented businesses within their respective communities.

If it is not reversed, the Seventh Circuit's decision will erode, if not destroy, this Court's long history of respecting local governments' predictive legislative judgment to find solutions to difficult problems. This Court should overturn the Seventh Circuit's ruling and reiterate the long-standing principle that local governments may pro-actively exercise their legislative judgment to address the secondary effects of sexually oriented businesses by using their zoning power to require that sexually oriented businesses be located in specific areas.

III. THE SEVENTH CIRCUIT'S DECISION EXACERBATES A GROWING CONFLICT IN THE CIRCUIT COURTS OF APPEAL REGARDING THE INTERPRETATION OF THIS COURT'S DECISION IN CITY OF LOS ANGELES V. ALAMEDA BOOKS.

Admittedly, the Seventh Circuit has recognized that "appellate decisions have struggled to understand and apply *Alameda Books*." *See Annex Books*, 581 F.3d

at 466. This struggle has caused conflict at the circuit court level, especially with respect to applying the *Renton* evidentiary standard to the regulation of "specific kinds" of sexually oriented businesses, like adult retail bookstores. This conflict supports the City's request that the Court hear this case.

In an approach similar to the one used by the Seventh Circuit in this case, the Fifth Circuit placed an increased burden on the city of San Antonio in *Encore Videos v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003). In *Encore*, a sexually oriented retail video store challenged the city's zoning provision that prohibited sexually oriented businesses from operating within 1,000 feet of residential areas, churches, schools, and parks. The Fifth Circuit struck down the ordinance on the basis that the city did not produce "some substantial evidence of the secondary effects of establishments that sell products solely for off-site consumption." *Id.* at 295. Interestingly, the Fifth Circuit reached a contrary conclusion several years later on a similar zoning ordinance in *H and A Land Corp. v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007) (finding it was reasonable for the city to rely on real estate appraiser surveys to predict that the presence of an adult bookstore would negatively affect real estate value in surrounding area), *cert. denied*, 552 U.S. 825 (2007).

On the other hand, other circuit courts have more faithfully applied the "reasonably believed to be relevant" evidentiary standard under *Renton* and *Alameda Books*. For example, in *Richland Bookmart, Inc. v. Knox County*, 555 F 3d 512 (6th Cir. 2009), the Sixth Circuit upheld a county's sexually oriented

business regulations against an attack made by two sexually oriented businesses that sell and rent books, magazines, and videos to adults for "off-site consumption" or "retail only." Interpreting *Alameda Books*, the Sixth Circuit stated that "[r]equiring local governments to produce evidence of secondary effects for all categories created by every articulable distinction is a misapprehension of the Supreme Court's holding that governments may rely on any evidence 'reasonably believed to be relevant.'" *Id.* at 526. In addition, in another sexually oriented business "retail" case, the Ninth Circuit upheld a zoning ordinance similar to the one struck down by the Seventh Circuit in this case. *See World Wide Video*, 368 F.3d at 1195 ("The citizen testimony concerning pornographic litter and public lewdness, standing alone, was sufficient to satisfy the 'very little' evidence standard of *Alameda Books*."). The Eleventh Circuit has also upheld a sexually oriented business zoning ordinance and public nudity ordinance from evidentiary attack in *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (2007), *cert. denied*, 128 S. Ct. 1246 (2008). In that case, the Eleventh Circuit expressly rejected the claim that *Alameda Books* "raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies." *Id.* at 880; *see also Flanigan's Enterprises, Inc. v. Fulton County*, No. 08-17035, 2010 WL 520542 (11th Cir. Feb. 16, 2010).

These conflicts necessitate that the Court clarify the evidentiary standard required by *Renton* and *Alameda Books*.

CONCLUSION

For the foregoing reasons, the Court should grant the City's Petition for Writ of Certiorari.

Respectfully submitted,

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